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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. ...385

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and
BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioners,

vs.

CLINCHFIELD RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on March 4, 1969. A timely petition for rehearing was denied on March 26, 1969.

OPINIONS BELOW.

The opinion of the District Court is reported in 278 Fed. Supp. 322 and is reprinted here as Exhibit A hereto. The opinion of the Court of Appeals is reprinted here as Exhibit B hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 4, 1969. A timely petition for rehearing was denied on March 26, 1969.

The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

Whether Section 8 of the Railway Labor Act (45 U. S. C., § 158) requires a specific agreement to arbitrate and whether such agreement must conform to all requirements of said statute.

STATUTES INVOLVED.

The applicable provisions of the Railway Labor Act, 45 U. S. C., § 151 et seq., provide as follows:

§ 157, Arbitration-Submission of controversy to arbitration

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in Sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, that the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Manner of selecting board of arbitration

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators, the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Board of arbitration; organization; compensation; procedure—(a) Notice of selection or failure to select arbitrators

Third. Then the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or all of the necessary arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) Organization of board; procedure

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings; Provided, however, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

* * *

(d) Competency of arbitrators

No arbitrator, except those chosen by the Mediation Board shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

* * *

(f) Award; disposition of original and copies

The board of arbitration shall furnish a certified copy of the award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of the award shall be filed in the office of the Interstate Commerce Commission: Provided, however, That such award shall not be

construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

* * *
* * *

§ 158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation

The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this chapter;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United State, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award; Provided, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by the board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when

acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: Provided, however, That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this chapter, deliver to such board of arbitration. May 20, 1926, c. 347, § 8, 44 Stat. 584; June 21, 1934, c. 691, § 7, 48 Stat. 1197; June 25, 1948, c. 646, § 32 (a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§ 159. Award and judgment thereon; effect of chapter on individual employee—Filing of award

First, The award of a board of arbitrators, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Conclusiveness of award; judgment

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds

hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Impeachment of award; grounds

Third: Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by the chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: Provided, however, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: Providing further, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Effect of partial invalidity of award

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall deter-

mine that a part of the award is valid, the court shall set aside the entire award: Provided, however, That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

* * *
* * *
* * *

Duty of employee to render service without consent; right to suit

Eighth. Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. May 20, 1926, c. 347, § 9, 44 Stat. 585; June 25, 1948, c. 646, § 32 (a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

STATEMENT.

A. The Facts.

Each of the petitioners is an unincorporated association and a labor organization that engages in collective bargaining in the railroad industry. At all times here material, the petitioner Order of Railroad Conductors and Brakemen (ORC&B) was the duly certified authorized and acting collective bargaining representative of road conductors employed by the respondent and the petitioner, Brotherhood of Railroad Trainmen (BRT) was the duly certified authorized and acting collective bargaining rep-

resentative of road brakemen employed by the respondent.[1]

The respondent is a railroad with a principal office and place of business at Erwin, Tennessee and is engaged in interstate commerce in the State of Tennessee and other states. It is a "carrier" as defined in Section 1 of the Railway Labor Act [45 U. S. C., § 151] and is subject to the provisions as there set out.

The case arises out of the respondent's attempt to pool cabooses under the provisions of Article 7 of the National Pooling of Cabooses Agreement with the Brotherhood of Railroad Trainmen, of May 25, 1951 and the National Pooling of Cabooses Agreement with the Order of Railway Conductors and Brakemen of May 23, 1952. In all material respects, the pooling of cabooses provisions in both agreements are essentially the same.

The provision as it appears in both agreements reads as follows:

ARTICLE 7.

Pooling of Cabooses.

(a) The employees affected by this rule and the carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees, being desirous of cooperating in situations where train service can be improved and trains expedited by the pooling of cabooses, adopt the following:

(b) Where an individual carrier not now having the right of pooling cabooses considers it advisable to establish such pooling, appropriate committee or committees representing the employees involved and proper repre-

[1] Both Brotherhoods on January 1, 1969 merged into a single union known as the United Transportation Union (UTU).

sentatives of the carrier will conduct negotiations relating thereto.

(c) A reasonable and practical approach to the problems hereinreferred to, namely—the pooling of cabooses —requires that the carriers and the employees definitely recognize each other's fundamental rights, and where necessary, reasonable and fair arrangements should be made in the interest of both parties.

It is further agreed that:

(1) Whenever the carrier desires so to pool its cabooses, it shall give notice to the General Chairman or General Chairmen of such intention, specifying the territory and service involved, whereupon the carrier and employee representative shall, within 30 days, endeavor to agree upon any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees and on appropriate arrangements for supplying and servicing such pooled cabooses.

(2) In the event the carrier and such representatives cannot so agree on the matter, any party involved may invoke the services of the National Mediation Board.

(3) If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. The decision of the Arbitration Board shall be final and binding upon both parties.

(d) This rule shall become effective August 1, 1951, except on such carriers as may elect to preserve existing rules or practices and so notify the authorized employee representatives on or before July 1, 1951.

On April 2, 1965 respondent carrier notified your petitioners of its desire to confer with them on April 6, 1965, pertaining to a matter of mutual interest and simultan-

eously notified both Brotherhood's of its intent and desire to implement the pooling of its cabooses. Due to the opposition of the Brotherhoods, the respondent on April 12, 1965 delayed its proposed date of April 16, 1965 for the implementation of the pooling of cabooses, for a period of thirty days.

The Brotherhoods notified the carrier of their continued opposition and noted the variance from the procedure outlined in Paragraph 7 (c) (1), i. e., the company's failure to give proper notice of their intention to implement the pooling of its cabooses. On May 17, 1965, the carrier gave formal notice of its intent. A subsequent meeting was arranged to discuss the implementation of the order. The Brotherhoods on May 26, 1965 jointly offered a counter-proposal which was rejected by the carrier on May 28, 1965.

The carrier on May 28th notified the Brotherhoods that it intended to proceed by invoking the services of the National Mediation Board under Article 7 (c) (2) of their national agreement, which provides that when an empasse is reached, either party may invoke the Board's services. The respective positions of the parties to the dispute was requested by the National Mediation Board, once the Board's good offices were invoked.

The Brotherhoods by letter of June 14, 1965 informed the Executive Secretary of the Mediation Board that intervention at that time by the Board would be premature and that the parties should be given an opportunity to resolve their differences through the collective bargaining process. The Board on June 21 requested the respondent carrier to resume conferences with the Brotherhoods. The Brotherhoods on July 15 submitted to the carrier a revised proposal which was rejected.

Again on July 26, 1965 the carrier wrote to the National Mediation Board requesting its services and in particular

the assignment of a mediator to conduct subsequent negotiations. A mediator was named by the Board. Conferences were held by the mediator with representatives of the carrier and brotherhoods, none of which resulted in a resolution of the difficulty.

Pursuant to Article 7 (c) (3) of the national agreements the carrier on September 8, 1965 requested the Mediation Board to establish an Arbitration Board to resolve the matter.

The carrier and Brotherhoods designated their respective representatives to the Arbitration Board and the first meeting of the Board was held on December 7, 1965. The meeting was recessed without a resolution of the differences. Thereafter the carrier on December 7, 1965 requested the National Mediation Board to appoint a neutral member. Both Brotherhoods notified the Board of their opposition to such an appointment. The text of their letters to the Board are attached hereto and marked as Exhibit C and Exhibit D. Particular attention is directed to Exhibit C, the letter of G. H. Harris, President of Order of Railway Conductors and Brakemen to the National Mediation Board, wherein he stated:

> "It is our further position that the National Mediation Board would have no authority to proceed with the appointment of an arbitrator under these circumstances pending resolution of the dispute over the meaning of Article 7, *unless there is a mutual agreement between the parties to dispute over the questions to be arbitrated.* We are definitely not agreeable to proceed with arbitration under these circumstances" (Our emphasis).

The Mediation Board on January 3, 1966 rejected the position of the Brotherhoods and advised them that a neutral arbitrator would be named and that the vehicle

to resolve this dispute had been officially classified as Arbitration Board No. 292, Case A-7432. Thereafter, the National Mediation Board appointed Mr. Bryon Abernethy as the neutral board member.

The Board No. 292 first convened on April 19, 1966 for the purpose of organization and determination as to its future course of conduct. Labor memberts at this time renewed their opposition to the Board's proceeding further until the initial question under Article 7 (a) [i. e., whether the train services could be improved and trains expedited by pooling of cabooses] had been resolved under the National Disputes Committee. The Disputes Committee having been created under Article 14 of the 1951 and 1952 pooling of cabooses agreements.

The neutral arbitrator rejected the position of the Brotherhoods and held that the Board proceed with consideration of the dispute on its merits. The Board next convened on January 4, 1967 with Brotherhood members participating only after entering into the record their position that the Board did not have jurisdiction to consider the matter. They then proceeded without waiver of any right, legal or otherwise. The award was subsequently rendered on May 3, 1967, and is marked as Exhibit E hereto.

On or about May 3, 1967, the respondent, acting through and by its representatives, and the neutral member of the Arbitration Board filed with the Clerk of the U. S. District Court for the Eastern District of Tennessee, Northeastern Division, the award and a record of the proceedings therein, purportedly in compliance with the provisions of the Railway Labor Act and particularly section 9, Second thereof (45 U. S. C., Section 9, Second).

B. **Proceedings Below.**

On May 12, 1967, the petitioners filed in the U. S. District Court for the Eastern District of Tennessee, North-

eastern Division, a petition and complaint for impeachment of the award and for declaratory judgment naming the respondent carrier as the defendant. Jurisdiction was founded generally under the Railway Labor Act (45 U. S. C., Section 151, et seq.) and particularly Section 159, Third thereof.

The Complainant alleged that the award and the proceeding therein were invalid and that the District Court lacked jurisdiction and statutory authority to enter a judgment thereon. The allegation rested upon the belief that the award plainly did not conform to the substantive requirements laid down by the Railway Labor Act, and the proceedings were not substantially in conformity with the said Act. The Complaint further alleged that the award did not conform nor confine itself to the stipulations of the agreement to arbitrate.

The carrier answered and moved to dismiss the action for want of jurisdiction, which motion was subsequently denied by the Court. The Court in its Memorandum Opinion and Order denying the Carrier's motion made note of the failure of the Arbitration Board to conform to provisions of 45 U. S. C., § 157, First and indicated that it would entertain a motion for summary judgment on this point from the Railway Brotherhoods.

Thereafter, the Brotherhoods filed their motion for summaary judgment and the Court on November 28, 1967 entered same. The respondent subsequently filed a motion for a new trial and alternative relief, which was thereafter denied by the Court on December 26, 1967.

A timely appeal was filed by the respondent. After the filing of briefs and argument the U. S. Court of Appeals for the Sixth Circuit reversed the District Court basing its decision on two points: (1) ". . . the unions waived their right to object to the statutory departure by participating in the arbitration proceedings without objection on

this point" (Op. pg. 6). (2) "While no specific agreement to arbitrate was executed, we think the collective bargaining agreement itself was such an agreement. To the extent the bargaining agreement does not meet the requirements of the Act, the variance was waived by the Unions" (Op. p. 6).

A timely petition to rehear was filed by your petitioners which was denied on March 26, 1969.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals in this case involves an important question of federal law which has not been but should be settled by this Court.

Even before the turn of the century, Congress was vitally concerned with the matter of labor disputes in the nation's railroad industry, recognizing the necessity for a comprehensive negotiation, mediation, and voluntary arbitration processes to avoid damage to the general public when labor-management relations appear to break down with resultant work stoppage. Congress, consistent with ordinary notions of fair play and freedom, introduced as early as 1888 a provision for voluntary arbitration and public investigations with respect to labor controversies in the railroad industry (25 Stat. 501).

That this matter was one of continuing concern to the Congress is evidenced by the legislative attention disputes in the railroad industry have received over the last 80 years. For from 1888 to Public Law 88-108 approved August 28, 1963, Congress gave its attention to disputes problems in the railroad industry repeatedly. See the Erdman Act of 1898, 30 Stat. 1424; the Newlands Act of 1913, 38 Stat. 103; the Railway Labor Act of 1926, 44 Stat. 577, amended in 1934, 48 Stat. 1186, in 1948, 62 Stat. 909, and in 1951, 64 Stat. 1238.

Thus the problem of a disputes settlement procedure in the railroad industry is one of grave national concern. In this litigation, the Court of Appeals for the Sixth Circuit has judicially created a major exception to the mandatory arbitration requirements of the Railway Labor Act. It has done this without reference to either the language of the statute itself or to its extensive legislative history. No other court of appeals or any state or lower court has ever heretofore held that a valid arbitration proceeding could be had under the Railway Labor Act without conformity to the substantive provisions of 45 U. S. C., § 158 which statute outlines in careful detail the requirements for an arbitration proceeding under such Act. That these requirements were not observed in the present case is uncontested nevertheless, the Court of Appeals approved this departure thereby permitting Respondent to circumvent the carefully specified procedures for negotiation, mediation and ultimately arbitration which the Act prescribes as the primary means for settling labor disputes in the railway industry.

The Court of Appeals created an exception for this carrier, as Mr. Justice Rutledge once put it, "for this day and this train only" on a wholly untenable waiver theory which we shall hereinafter advert to. In our view, there is no basis in law or policy for the exception this created. And we suggest further that this exception constitutes a potentioally serious disruptive element in railway labor relationships which could have effects well beyond the particular labor dispute here involved. For as a consequence of the Court's determination, Petitioners, who are the statutory bargaining representative for more than a quarter of a million railway workers, were held bound by an arbitration award which admittedly did not conform to the statutory requirements of the Railway Labor Act set out in 45 U. S. C., § 158, which proceedings were held in the absence of the written submission agreement man-

datorily required by the statute; without even a definition of the issue to be decided by the Arbitrator, similarly required by the statute, on the theory that by appearing to protest the jurisdiction of the Arbitration Board Petitioners "waived" their right to contest the validity of the resulting arbitration award.

Thus in effect Petitioners were subjected to an award in a proceeding which not only did not conform to the requirements of the Railway Labor Act but to the award of the tribunal whose jurisdiction was challenged from the beginning by Petitioners and which award dealt with an issue which had not been defined by the required written submission agreement mandatorily required by the Act.

We suggest that the entire arbitration proceeding comes perilously close to compulsory arbitration and is as antithetical to the mediation voluntary arbitration premises of the Railway Labor Act as day is to night.

1. The Railway Labor Act specifies in detail the procedures to be used by a carrier covered by the Act in implementing changes in existing rates of pay, rules, or working conditions of its employees covered by collective bargaining agreements.

Section 6 of the Act, 45 U. S. C., § 156 entitled, "Procedures in Changing Rates of Pay, Rules and Working Conditions", provides that the party desiring a change in conditions "shall give at least 30 days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions". Within this 30-day period preceding the change, a conference must be agreed upon between the parties to the dispute. The Act thus contemplates face-to-face negotiations prior to the implementation of any change in existing conditions of employment. If this negotiation is unsuccessful in reaching agreement

prior to the implementation of the change, the Act provides that either party to the dispute may request the services of the National Mediation Board, whereupon the National Mediation Board is required to offer its services "and promptly put itself in communication with the parties to such controversy and shall use its best efforts to bring them to agreement." (45 U. S. C., § 155, Section 5, First.) The Act continues that if the efforts of the Mediation Board "shall be unsuccessful", the Board shall at once "endeavor . . . to induce the parties to submit their controversy to arbitration **in accordance with the provisions of this statute.**" Should mediation fail, Section 10 of the Act, 45 U. S. C., § 160, provides for the creation of a Presidential Board of Review.

Here the Carrier and the Unions had entered into a collective bargaining agreement setting forth in Article VII the procedures to be followed should a Carrier desire to pool its cabooses. These procedures required the statutory 30-day notice from the Carrier of an intention to modify working conditions in respect of pooling of cabooses (Article VII (1) Collective Bargaining Contract); provided in the event of a lack of agreement between the parties for referral to the National Mediation Service; and provided, as does the Railway Labor Act, that if such mediation failed the matter would be "submitted to arbitration *under the Railway Labor Act as amended.*"

When mediation did fail, instead of referring the matter back to the Carrier and the Unions for the drafting of the arbitration submission agreement required by 45 U. S. C., § 158, the National Mediation Board appointed a "neutral member" for an arbitration board it sought to create. Petitioners promptly challenged the authority of the Mediation Board in the premises, noting the absence of a "mutual agreement" between the parties to the dispute "**over the questions to be arbitrated.**" And when the hearings before the neutral member appointed by the National

Mediation Board commenced, the Unions once again, and at their first opportunity, challenged the jurisdiction of the Board and participated under such reservation throughout the proceeding.

The Court of Appeals conceded the statutory departure but treated it in an almost cavalier manner noting only and erroneously that "the Unions waived their right to object to the statutory departure by participating in the arbitration proceedings . . ." Opinion, p. 6. Further and after conceding the absence of a "specific agreement to arbitrate," the Court of Appeals equated the collective bargaining commitment of the parties to **enter into an arbitration agreement** "under the Railway Labor Act" as, in fact, **being** "such an agreement." Incredibly the Court below added that, "to the extent the bargaining agreement does not meet the requirements of the Act, the variance was waived by the Unions" and this despite the fact **the record was clear** that the Unions objected to the jurisdiction of the National Mediation Board to constitute the Arbitration Board and thereafter to the jurisdiction of the Board itself.

Thus in a very real sense the Court of Appeals has substituted involuntary arbitration for voluntary arbitration.

The Railway Labor Act carefully provides through a series of detailed provisions for negotiation, mediation and arbitration in major disputes involving changes in rules and working conditions. And changes in rules and working conditions may be made only after the statutory procedures have been pursued or exhausted.

Here there was no pretense at compliance with the arbitration provisions of the Act. But the Court of Appeals nevertheless, and for the first time, created an exception to the Act, permitting imposed arbitration which

admittedly did not comport with such substantive provisions as a written agreement to arbitrate **defining the issue to be submitted to arbitration.**

Neither the words nor the purposes of the Act are served by such a construction. And such a determination hinders, rather than promotes, the full utilization of voluntary arbitration as a method for settling disputes in the transportation industry subject to the Railway Labor Act.

In fact, and as a direct result of the Court of Appeals' decision in this case, transportation unions would be extremely reluctant to enter into a collective bargaining agreement containing a commitment to resort to arbitration if such a commitment is to be construed as permitting arbitration procedures which are admittedly at variance with the requirements of the Railway Labor Act to the prejudice of the transportation Unions.

In any arbitration proceeding, agreement upon the question to be arbitrated is fundamental. Here there was no such agreement, despite the fact that the statute, as well as ordinary common sense, calls for such an accord. And despite this substantive departure from the clear, plain, and unambiguous language of 45 U. S. C., § 158 (e) which says that the agreement to arbitrate "shall state specifically the questions to be submitted to the said Board for decision" an award was upheld resulting from a proceeding in which no agreement to arbitrate was ever reduced to writing nor were any other provisions of 85 U. S. C. A. comported with in the arbitration proceeding and the resulting award.

This Court has previously noted that the "procedures of the Act are purposely long and drawn based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." **Brotherhood of Railway and Steamship Clerks, et al. v. Florida**

East Coast Railway Company, 384 U. S. 238, at 245. But as this Court said in the **Florida East Coast Railroad Company** case, "The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what their act requires to be done by the other orderly procedures." 384 U. S. at 248.

Here the Carrier inveighed the Mediation Service to appoint a neutral member to an arbitration board, ignoring the Union's protest that no agreement upon the question to be submitted to arbitration had been executed; the arbitration was then had without any regard for the statutory requirements respecting arbitrations set out in 45 U. S. C., § 158; and the award of the Arbitrator on the undefined questions submitted to him was sanctioned by the Court of Appeals on an estoppel theory, despite the undisputed fact that from the outset the Unions had contested the jurisdiction of the Mediation Service first and of the Arbitration Board later because of the absence of compliance with the requirements of the arbitration provisions of the Railway Labor Act, and, indeed, of the collective bargaining agreement which required any arbitration respecting the pooling of cabooses to be conducted *"under the Railway Labor Act"*, meaning in accordance with the terms thereof. And this despite the firmly established view that any agreement to arbitrate under the Railway Labor Act must strictly adhere to the essential terms of such arbitration agreement. See, e. g., **Railway & Steamship Clerks, et al. v. Norfolk, Southern Railway Company** (C. A. 4), 143 F. 2d 1015.

2. In sum, the Court of Appeals' exception of this Carrier from the clear requirements of the Railway Labor Act is patently erroneous. In our view it is important for this Court to reject the decision of the Court of Appeals, wholly unsupported by the Act, which threatens to subvert the statutory mediation and arbitration procedures

found in the Railway Labor Act. For we suggest that the decision below cannot be squared with either the commitment to enter into arbitration contained in the collective bargaining agreement or with the plain terms of the Railway Labor Act itself.

CONCLUSION.

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN S. McLELLAN,

D. BRUCE SHINE,
421 E. Market Street,
Kingsport, Tennessee 37660,

HERBERT S. THATCHER,
1009 Tower Building,
Washington, D. C. 20005,
Attorneys for Petitioners.

Of Counsel:
McLELLAN, THATCHER & DONAHUE,
1009 Tower Building,
Washington, D. C. 20005.

EXHIBIT A.

In the United States District Court for the
Eastern District of Tennessee,
Northeastern Division.

Order of Railway Conductors & Brakemen and Brotherhood of Railway Trainmen, Plaintiffs, v. The Clinchfield Railroad Company, Defendant.	}	Civil Action No. 2100.

MEMORANDUM OPINION AND ORDER.

(Filed Nov. 10, 1967.)

The jurisdiction of this Court is sought to be invoked by the plaintiffs-union under 28 U. S. C., §§ 1331 and 1337 for the purpose of impeaching and contesting an award of an arbitration board of the National Mediation Board, rendered on May 3, 1967, and for a declaratory judgment, 28 U. S. C., §§ 2201-2202. At the pretrial conference of August 11, 1967 herein, the Court was of the opinion that there could be a disposition of this action on the bases of proper motions filed by the respective parties. The defendant interposed a motion to dismiss the complaint, on the ground that this Court lacks jurisdiction under 28 U. S. C., §§ 1331 or 1337 or 2201-2202 or under 45 U. S. C., §§ 159, Third, and further because this action does not arise under the Railway Labor Act, 45 U. S. C., §§ 151 *et seq.* The plaintiffs-union filed no motion.

The facts essential to a disposition are undisputed, *viz.*: The respective plaintiffs-union and the defendant railroad

entered into separate bargaining agreements, both which were in effect in 1965. Article 7 of each of these agreements is essentially the same and is concerned with the pooling by the defendant railroad of its cabooses.

By § (a) of that article, the contracting parties adopted procedures, as set forth in §§ (b) and (c) thereof, governing the conduct of the parties in the event the defendant railroad wished to invoke such pooling plan. Subsection (1) of § (c) describes the method by which the contracting parties shall "• • • endeavor to agree upon any facilities that should be furnished [by the railroad] to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees [of the railroad] and on appropriate arrangements for [the railroad's] supplying and servicing such pooled cabooses."

The railroad sought to institute the pooling system adverted to at its yards in Erwin, Tennessee. A controversy arose within the jurisdiction of this Court, and the contracting parties conferred in acocrdance with Article 7, § (c) (1) on May 29, 1965 but were unable to agree on the facilities, accommodations and arrangements appertaining to the pooling.

The carrier then invoked the services of the National Mediation Board, agreeably with Article 7, § (c) (2), on June 1, 1965. A mediator of that Board undertook to inspire an amicable settlement of the issue between the contracting parties. The Board declared on September 24, 1965, that the best efforts of its mediator to bring about an amicable settlement of the issue through mediation had been unsuccessful.

Article 7, § (c) (3), provides as follows:

> "• • • If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. • • •"

Thus, "* * * The arbitration procedure to be followed was that prescribed in the agreement[s] executed between the carrier and the * * *" respective plaintiffs-union. **Batts v. Louisville and Nashville Railroad Company**, C. A. 6th (1963), 316 F. (2d) 22, 27 [2]. Obviously, those agreements prescribed that, where, as here, negotiations of the parties for a settlement of this particular dispute were unsuccessful and mediation had failed, the controversy would "* * * be submitted to arbitration under the Railway Labor Act, as amended. * * *"

Arbitration under the Railway Labor Act is by submission of the controversy to "* * * a board of three (or, if the parties to the controversy so stipulate, of six) persons * * *." 45 U. S. C., § 157, First. The board of arbitration, under the Act, is required by 45 U. S. C., § 157 (f), to certify and transmit the original copy of its award, together with certain other documents, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office. See also 45 U. S. C., § 159, First. The award becomes conclusive on the parties, unless within a specified period, a petition to impeach the award on one or more certain grounds is filed in the clerk's office of the court in which the award has been made. 45 U. S. C., § 159, Second. Such court is authorized and empowered to entertain a petition for the impeaching or contesting of such award if, *inter alia*, one of the grounds assigned is that the award does not conform to the stipulations of the agreement to arbitrate. 45 U. S. C., § 159, Third (b).

The aforementioned controversy of these parties was submitted to arbitration at Erwin, Tennessee, within this District, to a board of five persons, comprised of two representatives of the carrier, one representative of the plaintiff Order of Railway Conductors, one representative of the plaintiff Brotherhood of Railroad Trainmen and

Brakemen, and a neutral member thereof, selected by the National Mediation Board.[1] Such board certified and transmitted the original copy of its award and the required documents to the clerk of this Court, and same were filed by the clerk on May 3, 1967, and docketed as miscellaneous docket No. 12.[2] Within the period specified by 54 U. S. C., § 159, Second, the plaintiffs-union filed their petition to impeach and contest the award on the ground, *inter alia,* that the award does not conform to the stipulations of the respective agreements of the parties litigant to arbitrate. 45 U. S. C., § 159, Third (b).

This Court is ever mindful of the clearly established national policy to encourage the use of arbitration. **Rhine v. Union Carbide Corporation,** C. A. 6th (1965), 343 F. (2d) 12, 16 [12]. When the judiciary undertakes to determine the merits of a labor dispute under the guise of interpreting the procedures in collective bargaining agreements, "* * * it usurps a function which under the regime is entrusted to the arbitration tribunal. * * *" **United Steelworkers v. American Mfg. Co.** (1960), 363 U. S. 564, 569, 80 S. Ct. 1343, 4 L. Ed. (2d) 1403, 1407 (headnote 7). This Court pretermits all consideration of the merits of the dispute of the parties, but, "* * * the courts have long ruled that there must be strict adherence to the essential terms of the agreement to arbitrate. * * *" **Brotherhood of R. and S. Cl., etc. v. Norfolk So. Ry. Co.,** C. A. 4th (1944), 143 F. (2d) 1015, 1017 [3]; **McCormick v. Gray** (1851), 13 How. 26, 37-38, 13 L. Ed. 36, 40-41; see also 5 Am. Jur. (2d) 540, Arbitration and Award, § 26.

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[1] The Court has considered and rejected the strained concept that there were in actuality **two** boards of arbitration considering the same dispute under two separate agreements, with the neutral person serving concurrently as the third member of each of the two boards of three persons.

[2] This Court takes judicial notice of these, its own records, in the instant consideration.

The contracting parties themselves invoked, with a specific condition precedent, the statutory arbitration procedures of the Railway Labor Act. "* * * The Court, as in the case of all agreements, must give effect to the intent of the parties as evidenced by the agreement[s] [themselves] which will be liberally construed to that end. The Court further observes that although an arbitration agreement has the formal aspects of a contract, it nevertheless, by its very nature, assumes the absence of an agreement between the parties,[3] other than the basic agreement on the mode of settlement. Arbitration is, then, a method, a means, a procedure, rather than an agreement. * * *" **Arlington Towers Land Corp. v. John McShain, Inc.**, D. C. D. C. (1957), 150 F. Supp. 904, 923 [3].

When private negotiations and mediation both failed, this issue became governed by the Railway Labor Act, and the failure of the parties to comply with the procedure set forth in 45 U. S. C., § 157, First, resulted in proceedings which did not, "* * * supply the foundation for a valid arbitration and award * * *", 5 Am. Jur. (2d) 539-540, Arbitration and Award, § 25. The terms of the submission of this controversy to arbitration were relevant portions of the parties' agreements, and where the matters which were determined by the board were not within the terms of the submission, i. e., within the arbitration provisions of the contracts, the arbitrators "* * * exceed[ed] their jurisdiction, and their award may be set aside * * *" in this proceeding. **Texoma Natural Gas Co. v. Oil Workers I. U., Etc.**, D. C. Tex. (1943), 58 F. Supp. 132, 146-147 [14], affirmed C. A. 5th (1944), 146 F. (2d) 62, certiorari denied (1945), 324 U. S. 872, 65 S. Ct. 1017, 89

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[3] As to the absence of agreement within an agreement to arbitrate, **cf. Local Union No. 988, Etc. v. B. & T. Metals Co.**, C. A. 6th (1963), 315 F. (2d) 432, 436 [2], and cases there cited and quoted from.

L. Ed. 1426, rehearing denied (1945), 325 U. S. 893, 65 S. Ct. 1183, 89 L. Ed. 2004.

This Court is clothed with original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. 28 U S. C., § 1337. The Railway Labor Act, 45 U. S. C., §§ 151 *et seq.* is an Act of Congress regulating commerce. 45 U. S. C., §§ 151, First, Fourth and Fifth, 151a. The plaintiffs-union allege that this action or proceeding is brought particularly under 45 U. S. C., § 159, Third. This properly invokes the jurisdiction of this Court, under all the circumstances, under 28 U. S. C., § 1337. See **Felter v. Southern Pacific Co.** (1959), 359 U. S. 326, 329, 79 S. Ct. 847, 3 L. Ed. (2d) 854, 858 (headnote 3). The defendant's motion of September 5, 1967 to dismiss this action or proceeding for want of jurisdiction, therefore, hereby is

Denied.

It appearing to the Court that the provisions of 45 U. S. C., § 157, First, with reference to the composition of the membership of the board of arbitration under which the parties litigant agreed to submit this controversy to arbitration, constitute essential terms of their agreement to arbitrate, **Brotherhood of R. and S. Cl., etc. v. Norfolk So. Ry. Co.**, *supra*; **McCormick v. Gray**, *supra*; 5 Am. Jur. (2d), *supra*, at 540; and that there was not strict adherence to such essential terms of the agreements to arbitrate in this instance, the Court will now entertain a motion for a summary judgment on this point from the plaintiffs-union.

Enter:

C. G. Neese,
United States District Judge.

For publication.

EXHIBIT B.

OPINION.

(Filed Mar. 4, 1969.)

No. 18519.

United States Court of Appeals
For the Sixth Circuit.

Order of Railway Conductors and Brakemen and Brotherhood of Railroad Trainmen, Plaintiffs-Appellees, v. Clinchfield Railroad Company, Defendant-Appellant.	On Appeal from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

Decided March 4, 1969.

Before: McCree and Combs, Circuit Judges, and McAllister, Senior Circuit Judge.

Combs, Circuit Judge. The Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen filed this action to impeach an award under Section 9 of the Railway Labor Act, 45 U. S. C., § 159. Defendant-appellant, Clinchfield Railroad Company, moved to dismiss the action as beyond the court's jurisdiction. The district court denied the railroad's motion and entered summary judgment, granting the relief sought by the unions. This appeal followed.

The controversy concerns the railroad's rights with regard to the "pooling of cabooses." It had been a long-standing custom of Clinchfield Railroad that designated cabooses would be assigned to certain train runs. Thus, workers on a particular run were always assured of having the same caboose. The men could thereby equip and maintain the caboose to their liking and assure themselves that off-duty time and lay-overs would be spent in comfortable and familiar surroundings.

This practice was not without difficulty for the railroad. When cabooses were not being used, they were placed on a siding at the terminal specifically reserved for cabooses. Apparently it was not feasible to place the cabooses on the siding in any particular order. Thus, when a given caboose was needed, there might be several other cabooses in front of it, necessitating considerable movement and replacement of cars to get a caboose on its assigned train.

The collective bargaining agreements between Clinchfield and the unions provided procedures to be followed should the railroad desire to change the system of caboose assignment and "pool" its cabooses, that is, assign cabooses on a random basis, or to furnish lay-over facilities other than cabooses. The purpose of these procedures was to require an orderly resolution of any differences that might arise over the employees' substitute accommodations. In relevant part, these procedures were as follows:

> "(1) Whenever the carrier desires to so pool its cabooses, it shall give notice to the General Chairman or General Chairmen of such intention, specifying the territory and service involved, whereupon the carrier and employee representative shall, within 30 days, endeavor to agree upon any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees and on appropriate ar-

rangements for supplying and servicing such pooled cabooses.

"(2) In the event the carrier and such representatives cannot so agree on the matter, any party involved may invoke the services of the National Mediation Board.

"(3) If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. The decision of the Arbitration Board shall be final and binding upon both parties."[1]

The general chairmen of appellee unions were asked to meet on April 6, 1965, with L. R. Beals, personnel officer of the Clinchfield Railroad. Beals informed them that the railroad had decided to pool all cabooses. The unions advised him they they were opposed to such action, but the railroad announced that commencing April 16, 1965, all cabooses would be pooled. The union responded by demanding that the railroad comply with the above quoted procedures of the collective bargaining agreements, and the railroad agreed.

The dispute continued through the stages of negotiation and mediation without resolution, the parties being in conflict as to the substitute facilities which should be provided. The unions contended that the railroad had no right to pool the cabooses. This contention was based on a clause of the collective bargaining agreements which provided as follows:

"The employees affected by this rule and the carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees, being de-

[1] These procedures are set out in Article 7, Pooling of Cabooses, in the Brotherhood of Railroad Trainmen Agreement of May 25, 1951, and the Order of Railway Conductors and Brakemen Agreement of May 23, 1952.

sirous of cooperating in situations *where train service can be improved and trains expedited* by the pooling of cabooses, adopt the following: . . .'' (Emphasis ours.)

The unions contend that the italicized clause made it incumbent upon the railroad to show that train service could be improved and trains expedited prior to any negotiations on facilities. In spite of this contention, however, the unions vigorously pressed their demands for various substitute facilities. By September 8, 1965, the dispute had progressed through the mediation stage without success and the railroad wrote the National Mediation Board, requesting that an arbitration board be established.

On September 9, 1965, the unions requested the mediation board to postpone the case in order to allow the parties more time to resolve the dispute, or to permit the Unions to seek an interpretation of the bargaining agreements. The board denied this request and requested that the parties proceed toward arbitration. The railroad named an arbitrator and asked the unions to do likewise. The unions responded by naming two arbitrators, one from each organization. The parties being unable to agree on a neutral arbitrator, the railroad requested that the mediation board name such a person.

The unions asked that the railroad's request for a neutral arbitrator be held in abeyance by the board until a construction of the bargaining agreements could be obtained. The requested delay was denied by the mediation board and, shortly thereafter, a neutral arbitrator was named. The arbitration board was eventually composed of five members since, following the designation of two arbitrators by the unions, the railroad named another member.

The unions again contended at the arbitration proceedings that the board was without jurisdiction until the

bargaining agreements were interpreted in other proceedings. The neutral arbitrator, however, ruled that jurisdiction existed and the merits of the dispute were considered. An arbitration award was made and, on May 3, 1967, the award was filed in the United States District Court for the Eastern District of Tennessee, as required by 45 U. S. C., §§ 157 Third (f) and 159 First.

Sections 7 and 9 of the Act require that, following submission of a controversy to arbitration and the arbitrators' resolution of the matter, the award and the record of the proceedings shall be filed in an appropriate district court. In the absence of a petition to impeach the award within ten days after such filing, judgment is entered upon the award and it becomes final.

The unions filed a timely petition to impeach the arbitration award. The district court in holding for the unions found that the statutory provision of 45 U. S. C., § 157 First, requiring an arbitration board of either three or six members, was not complied with. The railroad's motion to dismiss the action as beyond the court's jurisdiction was based on the theory that the arbitration was held pursuant to common law rather than the Railway Labor Act. This motion was properly dismissed since it is clear that, in view of the negotiation procedures actually followed, the arbitration was held pursuant to the Act.

The Railway Labor Act contains no requirement of compulsory arbitration. The mandatory provisions of the Act are exhausted when the parties finish mediation. As an alternative to self-help in the form of unilateral contract change, or a strike, the Act provides a voluntary arbitration procedure which may be invoked upon the parties' written agreement to arbitrate. The union's principal argument for sustaining the district court's decision stems from the supposed inadequacy, or the absence, of an agreement to arbitrate as contemplated by Section 8 of the Act. 45 U. S. C., § 158.

The grounds upon which a district court may properly impeach an arbitration award are enumerated in Section 9 Third of the Act. 45 U. S. C., § 159. The unions contend on this appeal that the award was properly set aside by the district court because "the proceedings were not substantially in conformity with [the Act]." 45 U. S. C., § 159 Third (a). They complain especially about the improper number of arbitrators and the lack of a specific agreement to arbitrate.

The courts are properly reluctant to enter a controversy which is subject to arbitration or to discard the fruits of an arbitration fairly conducted. *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593 (1960); *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574 (1960); *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960).

It is also well settled that defects in proceedings prior to or during arbitration may be waived by a party's acquiescence in the arbitration with knowledge of the defect. *Chicago R. I. & P. Ry. Co.* v. *Union Pac. R. Co.*, 254 Fed. 235 (8th Cir. 1918); *Arbitration: Ilios S & T Corp. and American Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698 (D. C. N. Y. 1957); *Petrol Corporation* v. *Groupement D'Achat des Carburants*, 84 F. Supp. 446 (D. C. N. Y. 1949); 6 C. J. S., *Arbitration and Award*, § 69 (1937). Moreover, if the impeaching party's own action contributes to a variance from the prescribed procedure, such party may be estopped to complain of the variance. 5 Am. Jur. 2d, *Arbitration and Award*, § 183 (1962).

We conclude that the district court erred in impeaching the arbitration award. The district judge in his memorandum opinion emphasized that the arbitration board was composed of five members, whereas the statute, 45 U. S. C., § 153 First, provides that the board shall consist of three persons or, if the parties to the controversy so

stipulate, of six persons. We are of the opinion that the unions waived their right to object to the statutory departure by participating in the arbitration proceedings without objection on this point.

The difficult question concerns the sufficiency of the agreement to arbitrate required by Section 8 of the Railway Labor Act. While no specific agreement to arbitrate was executed, we think the collective bargaining agreement itself was such an agreement. To the extent the bargaining agreement does not meet the requirements of the Act, the variance was waived by the Unions.

The procedures of the collective bargaining agreements, which culminated in the arbitration of this dispute, were initiated at the insistence of the unions. At each of the three procedural levels—negotiation, mediation, and arbitration—the unions presented their views on the merits of the dispute. The only objection made by the unions was that the railroad had no right to pool cabooses and that the case should be held in abeyance until an interpretation of the bargaining agreements could be obtained. That point was decided adversely to the unions by the mediation board and by the arbitrators. The correctness of that decision was not raised in their complaint to impeach the award, apparently because the unions recognize that a court is reluctant to remove a dispute from arbitration under the guise of interpreting a bargaining agreement. *Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574 (1960).

The judgment of the district court is reversed and the case is remanded for entry of judgment on the award, as provided by 45 U. S. C., § 159 Second.

EXHIBIT C.

(Letterhead of Order of Railway Conductors and Brakemen, Cedar Rapids, Iowa 52401.)

December 24, 1965

12-W-Clinchfield

Mr. Thomas Tracy
Executive Secretary
National Mediation Board
Washington, D. C. 20572

Dear Mr. Tracy:

This will acknowledge my copy of your letter of December 16, 1965, NMB Case No. A-7432, concerning a dispute between the Clinchfield Railroad Company and the Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen. You call for my comments regarding the request of Mr. L. R. Beals that the National Mediation Board should name a neutral arbitrator and proceed to arbitrate the dispute.

These parties are in serious disagreement over the meaning of the national agreements as they relate to the carrier request, and it is our position that this carrier request under the circumstances which exist does not come under the scope of the national rule, which was not intended to serve as a vehicle by which carriers could progress a request to pool cabooses in a situation where the train service could not be improved or trains expedited thereby. Neither the National Mediation Board nor the arbitration procedure contemplated in Article 7 (c) (3) of the national agreement would have jurisdiction in interpret the meaning of Article 7 with regard to the validity of the carrier's request under that rule, which

is a vital part of the dispute betwen the parties. On the other hand, Article 14 of the national agreement dated May 23, 1952 contains a provision for the resolution of disputes which involve the interpretation or application of the terms of the agreement, including Article 7, and therefore that national disputes committee has jurisdiction over the dispute over the validity of the carrier's request. Since there is a vital issue over the scope of the agreement which would otherwise provide for arbitration, it is our firm position that arbitration is not in order until and unless the dispute over the validity of the request has been resolved. It is our further position that the National Mediation Board would have no authority to proceed with the appointment of an arbitrator under these circumstances pending resolution of the dispute over the meaning of Article 7, unless there is mutual agreement between the parties to dispute over the questions to be arbitrated. We are definitely not agreeable to proceed with arbitration under these circumstances.

It should also be noted that the Clinchfield Railroad Company elected to adopt Article 7 of the May 23, 1952 Agreement and in so doing did not preserve any existing rules or practices that may have been in effect prior to August 1, 1952. Therefore, Article 7 of the May 23, 1952 Agreement is the only rule or practice in full force and effect on that property concerning pooling cabooses.

It is the Order's position that Article 7 of the National Agreement is not applicable in this particular situation. If the Order's position is upheld by the Disputes Committee concerning the May 23, 1952 Agreement then the only course left for the Clinchfield Railroad to follow is via Section 8 of the Railway Labor Act.

We respectfully ask that the National Mediation Board hold the request of Mr. Beals in abeyance pending the resolution of the existing dispute between the parties as

to the meaning of Article 7 of the national agreement as it relates to the issue in tihs case, which dispute is under the jurisdiction of the Disputes Committee created by Article 14 of such national agreement. Please advise.

Very truly yours,

/s/ G. H. Harris,
G. H. Harris,
President.

CC: W. W. Carson
J. L. Kelley
C. Luna
J. M. King

EXHIBIT D.

(Letterhead of Brotherhood of Railroad Trainmen, General Offices, Cleveland, Ohio.)

CL:17:hb

December 22, 1965

Mr. Thomas A. Tracy
Executive Secretary
National Mediation Board
Washington, D. C. 20572

Dear Mr. Tracy:

This will acknowledge my copy of your letter of December 16, 1965 MMB Case No. A-7432, concerning a dispute between the Clinchfield Railroad Company and the Brotherhood of Railroad Trainmen and Order of Railway Conductors and Brakemen. You call for my comments regarding the request of Mr. L. R. Beals that the National Mediation Board should name a neutral arbitrator and proceed to arbitrate the dispute.

These parties are in serious disagreement over the meaning of the national agreements as they relate to the carrier request, and it is our position that this carrier request under the circumstances which exist does not come under the scope of the national rule, which was not intended to serve as a vehicle by which carriers could progress a request to pool cabooses in a situation where the train service could not be improved or trains expedited thereby. Neither the National Mediation Board nor the arbitration procedure contemplated in Article 7 (c) (3) of the national agreement would have jurisdiction to interpret the meaning of Article 7 with regard to the validity of the carrier's request under that rule, which is a vital part of the dispute between the parties. On the other hand, Article 14 of the national agreement dated May 25,

1951 contains a provision for the resolution of disputes which involve the interpretation or application of the terms of the agreement, including Article 7, and therefore that national disputes committee has jurisdiction over the dispute over the validity of the carrier's request. Since there is a vital issue over the scope of the agreement which would otherwise provide for arbitration, it is our firm position that arbitration is not in order until and unless the dispute over the validity of the request has been resolved. It is our further position that the National Mediation Board would have no authority to proceed with the appointment of an arbitrator under these circumstances pending resolution of the dispute over the meaning of Article 7, unless there is mutual agreement between the parties to dispute over the questions to be arbitrated. We are definitely not agreeable to proceed with arbitration under these circumstances.

We respectfully ask that the National Mediation Board hold the request of Mr. Beals in abeyance pending the resolution of the existing dispute between the parties as to the meaning of Article 7 of the national agreement as it relates to the issue in this case, which dispute is under the jurisdiction of the Disputes Committee created by Article 14 of such national agreement. Please advise.

Very truly yours,

Charles Luna,
President.

cc:
Mr. G. H. Harris, Pres., ORC&B
Mr. J. M. King, Vice President, BRT
Mr. W. D. Nidiffer, OGGC, Clinchfield (BRT)
Mr. W. W. Carson, Vice President, ORC&B.

EXHIBIT E.

NATIONAL MEDIATION BOARD.

ARBITRATION BOARD.

In the Matter of: The Clinchfield Railroad Company and Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen.	Arbitration Board No. 292 Case A-7432, Pooling of Cabooses.

(Award Rendered May 3, 1967.)

AWARD.

This Arbitration Board was created January 3, 1966, by the National Mediation Board in response to the Carriers' request of December 7, 1965. The case arises out of the Carriers' attempt to pool cabooses under the provisions of Article 7, Pooling of Cabooses, in the Brotherhood of Railroad Trainmen Agreement of May 25, 1951 and the Order of Railway Conductors and Brakemen Agreement of May 23, 1952. In all material respects the pooling of cabooses provisions in both Agreements are essentially the same. The provision as it appears in these Agreements reads as follows:

Article 7.

POOLING OF CABOOSES.

(a) The employees affected by this rule and the carriers represented by the Eastern, Western and South-eastern Carriers' Conference Committees, being desirous of cooperating in situations where train serv-

ice can be improved and trains expedited by the pooling of cabooses, adopt the following:

(b) Where an individual carrier not now having the right of pooling cabooses considers it advisable to establish such pooling, appropriate committee or committees representing the employees involved and proper representatives of the carrier will conduct negotiations relating thereto.

(c) A reasonable and practical approach to the problems herein referred to, namely—the pooling of cabooses—requires that the carriers and the employees definitely recognize each other's fundamental rights, and where necessary, reasonable and fair arrangements should be made in the intrest of both parties.

It is further agreed that:

(1) Whenever the carrier desires so to pool its cabooses, it shall give notice to the General Chairma or General Chairmen of such intention, specifying the territory and service involved, whereupon the carrier and employee representative shall, within 30 days, endeavor to agree upon any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees and on appropriate arrangements for supplying and servicing such pooled cabooses.

(2) In the event the carrier and such representatives cannot so agree on the matter, any party involved may invoke the services of the National Mediation Board.

(3) If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. The decision of

the Arbitration Board shall be final and binding upon both parties.

(d) This rule shall become effectiye August 1, 1951, except on such carriers as may elect to preserve existin grules or practices and so notify the authorized employee representatives on or before July 1, 1951.

After the Arbitration Board was constituted, the Organizations advised the Neutral Member that a dispute existed between the parties concerning the Carriers' right to avail itself of the procedures of Article 7 of the National Agreements, which dispute had been submitted to their respective National Disputes Committees. They insisted that until such time as the National Disputes Committees had resolved the dispute before them, Arbitration Board No. 292 lacked authority to proceed. The Carrier disagreed and insisted that Arbitration Board No. 292 proceed to resolve the dispute which it had been established by the National Mediation Board to resolve.

In view of the dispute between the parties as to the Board's authority, the Neutral Member of the Board convened Arbitration Board No. 292 at the Carriers' office, Erwin, Tennessee April 19, 1966.

. . . for purposes of organization of the Board, consideration of these positions of the parties, and a determination of the Board's next steps.

The Board met on April 19, 1966 and the positions of the parties with regard to the Board's authority to act were fully explored and made a matter of record in the Official transcript of Proceedings. Thereafter, on May 11, 1966, the Neutral Member and Chairman of the Board advised the parties and the partisan members of the Board that:

After a careful review of all the evidence and agruments advanced by the parties . . . I have no choice

but to conclude that this Board must proceed to a consideration of this dispute on its merits.

I must find that Article 7 of the ORC&B National Agreement of May 23, 1952, and Article 7 of the BRT National Agreement of May 25, 1951, govern in this dispute, and represent the mutually agreed-upon procedures for resolving it, including the parties' agreements to arbitrate this dispute.

I must further find that under the terms of these governing Agreements the matter now at issue before Arbitration Board No. 292, for resolution on its merits, is that specified in Article 7 (c) (1) thereof as follows:

> . . . any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees and appropriate arrangements for supplying and servicing such pooled cabooses.

In accordance with these determinations, the Board was next convened at Erwin, Tennessee, January 4, 1967 to consider the dispute on the merits. The Labor Party Members participated after making clear again that it was their position that Arbitration Board No. 292 did not have jurisdiction, and without waiving "any right, legal or otherwise." Recognizing the Labor Party Members' right to reserve such legal or other rights as they might have, the Board proceeded to a consideration of the case on its merits, that is on the issue as stated in the Neutral Members' letter to the parties, May 11, 1966 (see above).

Concerning this issue, the request of the Employees' Representatives was for:

1. Assigned lockers for each employee at Erwin, Tennessee.

2. Assigned lockers for all regular assigned crews at their away-from-home terminal.

3. Assigned lockers at all away-from-home terminals for pooled crews.

4. Kitchen facilities, including refrigerators and stoves at all away-from-home terminals to include Spartanburg, Spruce Pine, Bostich, Kingsport, Dante and Elkhorn.

5. Setting up, within the Award, appropriate arrangements for the servicing, cleaning and supplying of cabooses at regular intervals.[1]

The Carrier is agreeable to furnishing:

1. Individual lockers of the standard dimensions for assigned crews at established away-from-home terminals for crews whose cabooses are pooled.

2. Sufficient lockers on what is commonly called a chain gang basis for other crews tied up at away-from-home terminals.

3. Assigned lockers at home terminals for assigned (i. e., advertised,) crews, including pooled crews, whose cabooses are pooled.

The Carrier contends that the matter of servicing and supplying of cabooses is already taken care of by practice, custom, rule and exisiting Agreements, and calls for no action by this Board. It further contends that it is now furnishing suitable lodgings and meal allowance and that, therefore no refrigerator or kitchen facilities should be required.[2]

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[1] See Transcript, pp. 294-293.

[2] See Transcript, pp. 296-298.

Findings:

On the basis of the record before it, the Board finds that in order to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees, the Carrier should furnish the employees:

I. Individual, assigned lockers for all affected employees at their home terminal.

II. Individual, assigned lockers for all regular assigned crews at their away-from-home terminals.

III. Sufficient lockers on what is commonly called a chain gang basis for other crews tied up at away-from-home terminals, such lockers to be for the exclusive use of such crews.

IV. Refrigerators at all away-from-home terminals, including Spartanburg, Spruce Pine, Bostich, Kingsport, Dante and Elkhorn. The record indicates that such facilities are already available at all terminals except Dante (Tr. 260).

V. Lockers to be furnished as above should be at least 18 inches by 21 inches by 72 inches in size.

VI. The Board further finds that pooled cabooses should be properly supplied and serviced by the Carrier and be maintained at all times in condition comparable to that in which they have been maintained prior to pooling, such servicing to include proper cleaning at regular intervals.

VII. On the record before it, the Board cannot find that kitchen facilities at all away-from-home terminals as requested by the Employees are required in order to provide accommodations *substantially equivalent* to those formerly available on the cabooses *and used by the employees''* (Emphasis added).

Award.

The Carrier shall furnish facilities as per findings.

/s/ Byron R. Abernethy,
Byron R. Abernethy,
Neutral Member and Chairman,

/s/ L. R. Beals,
L. R. Beals,
Personnel Officer and Assistant to General Manager Clinchfield Railroad Company, Carrier Member,

/s/ C. E. Charles,
C. E. Charles,
Clinchfield Railroad Company, Carrier Member.

.....

W. W. Carson,
Vice President, Order of Railway Conductors and Brakemen,
ORC&B Member,

.....

J. M. King,
Vice-President, Brotherhood of Railroad Trainmen,
BRT Member.

In the Matter of: The Clinchfield Railroad Company, and Brotherhood of Railway Trainmen, and Order of Railway Conductors and Brakemen.	Arbitration Board No. 292, Case A-7432. Pooling of Cabooses.

(Award Rendered May 3, 1967.)

Certification.

This is to certify that the foregoing Award is the true Award of this Board of Arbitration in the above-entitled matter to be filed in the Clerk's office of the District Court of the United States for the Eastern District of Tennessee, North Eastern Division, and that the record to be filed herewith, consisting of a Transcript of Proceedings of the Board in two volumes and 300 pages; the Employees opening statement at the initial meeting of this Board, April 1966, an undated letter addressed to the Chairman, consisting of four pages and signed by W. W. Carson and J. M. King, plus five pages of attached excerpts from ORC&B Agreements for 1. Wage Increases, 2. Cost-of-Living Basis for Wage Rate Adjustments, 3. Rules changes applicable to Road Trainmen, Yardmen, Yardmasters, Stewards, etc., and for 4. 5-Day Work-Week, and Interim 6-Day Work-Week applicable to Yardmen and Yardmasters identified as Employees Exhibit No. 1; A letter addressed to Mr. L. R. Beals, Mr. Charles Luna and Mr. G. H. Harris, dated September 24, 1965, from Mr. Thomas A. Tracy, Executive Secretary, National Mediation Board, identified as Carrier Exhibit No. 1; A letter from Mr. Charles Luna to Mr. Thomas A. Tracy, dated December 22, 1965, consisting of two pages, identified as Carrier Exhibit No. 2; A letter from

Mr. G. H. Harris to Mr. Thomas A. Tracy, dated December 24, 1965, consisting of two pages, identified as Carrier Exhibit No. 3; A one-page letter from Thomas A. Tracy, Executive Secretary, National Mediation Board, dated January 3, 1966, addressed to Mr. L. R. Beals, Mr. Charles Luna and Mr. G. H. Harris, identified as Carrier Exhibit No. 4; and a Statement of Labor Party Members before Arbitration Board No. 292, A-7432, undated, consisting of three pages, constitutes the evidence of the proceedings before the Board relating to the aforesaid Award.

/s/ Byron R. Abernethy,
Byron R. Abernethy, Neutral Member,

/s/ L. R. Beals,
L. R. Beals, Carrier Member,

/s/ C. E. Charles,
C. E. Charles, Carrier Member,

W. W. Carson, Employee Member,

J. M. King, Employee Member.

State of Tennessee, }
County of Unicoi. }

On the 3rd day of May, 1967, before me the undersigned notary public in and for the State of Tennessee and the County of Unicoi, appeared Byron R. Abernethy, L. R. Beals, C. E. Charles, to me known to be persons described as Arbitrators in the foregoing Award who executed the same and duly acknowledged execution thereof for the purpose and purposes therein expressed.

/s/ W. W. Grubb,
W. W. Grubb, Notary Public.

My Commission Expires: January 15, 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 385

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—v.—

CLINCHFIELD RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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August, 1969

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IN THE

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No. 385

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—v.—

CLINCHFIELD RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1969. A timely petition for rehearing was denied on March 26, 1969. On June 19, 1969, Mr. Justice Stewart extended the time within which a petition for certiorari might be filed to and including July 24, 1969, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an arbitration award rendered under the Railway Labor Act by reason of an agreement to arbitrate may be impeached under the circumstances of this case, where the agreement to arbitrate did not contain all the recitals as to procedural matters set forth in Section 8 of the Act, but where the agreement specified that the arbitration be conducted under the Railway Labor Act, and the Act's procedures were either substantially complied with or noncompliance was waived or actively initiated by the party seeking to impeach the award.

STATEMENT

The dispute.—In April, 1965, the respondent, Clinchfield Railroad Company ("Clinchfield"), determined that henceforth the cabooses operated on its line would be run on a pooled basis. (Beals Aff. Ex. 1, p. 3)[1] Clinchfield announced its proposal to the affected brotherhoods, the Order of Railway Conductors and Brakemen ("Conductors") and the Brotherhood of Railroad Trainmen ("Trainmen"), and initially took the position that inasmuch as it viewed itself as already "having the right of pooling cabooses" it did not have to comply with the procedures of the National Pooling of Cabooses Agreements with the Conductors and the Trainmen. See Article 7(b) of the Agreements, Pet. 10; Beals Aff. Ex. 1, pp. 3-5. After discussions with the representatives of the Conductors and

[1] We thus refer to the affidavit of L. R. Beals and its Exhibit 1, which was filed by Clinchfield in the District Court in support of Clinchfield's motion to dismiss the complaint for impeachment of the award. The transcript of the proceedings before the Arbitration Board will be referred to as "Arb. Tr."

the Trainmen, at their insistence, Clinchfield in May, 1965, initiated the procedures for pooling of cabooses contemplated by the National Pooling of Cabooses Agreements.[2] See Pet. 10-11; Beals Aff. Ex. 1, pp. 5-6; Arb. Tr. 28.

The Conductors and the Trainmen responded by proposing an extensive list of conditions to be imposed upon the pooling of cabooses, some of which touched on the subject of "providing accommodations substantially equivalent to those formerly available on the cabooses and used by the employees" and the subject of "arrangements for supplying and servicing such pooled cabooses," as contemplated by the National Agreements, and others of which did not. See National Agreements, Article 7(c)(1), Pet. 11; Beals Aff. Ex. 1, pp. 7-8. At various times through July 1965, the parties conferred on the accommodations and arrangements to be furnished, but did not reach agreement; Clinchfield then requested the services of the Na-

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[2] We so refer to Article 7 of the National Agreement dated May 25, 1951, between various railroads and the Trainmen and Article 7 of the National Agreement dated May 23, 1952, between various railroads and the Conductors. The text of these articles are identical except as to the effective dates set forth in Article 7(d), and except that in the version adopted with the Conductors, at the conclusion of Article 7(c)(3), as set forth at Pet. 11, the following words are added: "except that the award shall not require the carrier to pool cabooses but shall be accepted by the parties as the conditions which shall be met by the carrier if and when cabooses are pooled. Provided further, however, if carrier elects not to put the award into effect, carrier shall be deemed to have waived any right to renew the same request for a period of one year following the date of said award, except by consent of employees party to said arbitration." With these exceptions, the texts of Article 7 are as set forth at Pet. 10-11.

The two National Agreements deal with a number of separate subjects in various articles, the subject of pooling of cabooses being but one subject among many. See n. 7, p. 14, *infra*. When we refer herein to the "National Pooling of Cabooses Agreements," we refer specifically to Article 7 of these National Agreements. References to the "National Agreements" in general terms will include references not only to Article 7 but to other articles.

tional Mediation Board, as provided in Article 7(c)(2) of the National Agreements. See Beals Aff. Ex. 1, pp. 10-13. A mediator was assigned and met with the parties in September, 1965, but the parties were unable to reach agreement as to the accommodations and arrangements to be furnished the men previously using the assigned cabooses. (Beals Aff. Ex. 1, pp. 13-15)

The National Agreements which had been signed by the Conductors and the Trainmen, respectively, and the various carriers, expressly provided in Article 7(c)(3) that: "If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. The decision of the arbitration board shall be final and binding upon both parties." Clinchfield, accordingly, then wrote the National Mediation Board suggesting that the arbitration procedure contemplated by Article 7(c)(3) of the National Agreements be commenced. The Mediation Board agreed, and in October, 1965, Clinchfield designated its arbitrator for the board. (*Id.*, at 15) In November, 1965, the Conductors and the Trainmen each named an arbitrator, and in December, 1965, the parties' arbitrators met and conferred upon the selection of a neutral arbitrator.[3] They were unable to agree on a neutral, and accordingly in response to a request by Clinchfield, the National Mediation Board early in 1966 set up an arbitration board comprised of the arbi-

[3] The Railway Labor Act provides that where the parties do not agree to an arbitration board of six persons, arbitration is to be conducted by a board of three persons. Section 7 *First*. In the case of a board of three, one is a representative of the carrier, another is a representative of the employees, and the third is chosen by the first two, or failing such choice, by the Mediation Board. Section 7 *Second* (a). Since the two brotherhoods each insisted on naming its own arbitrator, Clinchfield named a second arbitrator to represent it, so as to preserve the status of the neutral arbitrator as a tie-breaker.

trators named by the parties and a neutral named by the Board. See Sections 7 *Second* and *Third* (a) of the Railway Labor Act (the "Act").

The arbitration proceedings.—In the late stages of the discussions immediately before the submission to arbitration, the brotherhoods had cited the recital of Article 7(a) of the National Agreements which expressed the sentiments of the carriers and brotherhoods that they were "desirous of cooperating in situations where train service can be improved and trains expedited by the pooling of cabooses." (Pet. 10) The brotherhoods somewhat belatedly took the position that this required that a demonstration be made by the carrier that train service could be improved and trains expedited by the proposed pooling before the carrier had the right to pool cabooses. Beals Aff. Ex. 1, pp. 16-17; Pet. A14-A18. The brotherhoods also contended that no such showing had been made by Clinchfield. At first, the brotherhoods took the position that this issue should be determined by the arbitrator (Beals Aff. Ex. 1, pp. 16-17), but later the Presidents of the two brotherhoods in letters to the National Mediation Board expressed the view that this issue was not even arbitrable. Pet. A14-A18. When the arbitration board convened, the brotherhoods renewed their contention that until the issue of the carrier's right to invoke Section 7 of the National Agreements had been resolved, the board was without power to proceed. A letter to this effect to the neutral arbitrator was put into the record of the proceedings. Arb. Tr. 12.[4] No other specific objection to the con-

[4] The letter was filed in the District Court as part of the proceedings before the arbitration board. See Pet. A26. It is substantially similar to the "Statement of Labor Party Members" later submitted to the board which is attached as Appendix B hereto.

stitution of the board or its procedures was made, except that the brotherhood representatives made the related objection that the issues to be decided by the arbitration board had not been properly defined. See Arb. Tr. 17, 58-59, 67, 79.

The arbitration board met in April, 1966, to review the preliminary question as to the powers of the carrier to invoke the procedures under Section 7 of the National Agreements and its own jurisdiction to proceed further in the light of the brotherhoods' assertions. After this session, the neutral member of the board in May, 1966, rejected the contentions of the brotherhoods as to these matters. Pet. A21-A22; Arb. Tr. 149-149A, 170.

The board then convened again in January, 1967, to consider the ultimate substantive question as to what accommodations would be "substantially equivalent to those formerly available on the cabooses" and what arrangements would be appropriate "for supplying and servicing such pooled cabooses." The brotherhood representatives reiterated their objections previously made to the jurisdiction of the board, to the effect that the carrier had not demonstrated what they claimed to be the preconditions to its rights to pool cabooses; they participated in further proceedings before the board subject to those objections; however, no other objection to the composition of the board or to the board's procedures was made. Pet. A22; Arb. Tr. 150, 161-67.[5]

The board then reviewed in detail the proposals for alternative facilities, such as kitchen facilities, refrigera-

[5] The brotherhood representatives at this time presented to the neutral arbitrator a written statement of their position, which was also read into the record. Arb. Tr. 162-66. It is attached as Appendix B hereto.

tors, stoves and lockers, as advanced by the brotherhoods and by Clinchfield. Arb. Tr. 181-82, 193-98, 203-04, 215-16, 221-34, 253-82, 293-98. The neutral member found that various facilities, more extensive than those proposed by Clinchfield but less extensive than those requested by the brotherhoods, should be provided. Pet. A24. The Clinchfield representatives concurred in an award to this effect and the brotherhood representatives declined to execute it. Pet. A25. The neutral member and the carrier members then executed the certification of the award as specified in Section 8(k) of the Act, and the same was filed on May 3, 1967, in the Clerk's Office of the United States District Court for the Eastern District of Tennessee, the district where the controversy arose and the arbitration was entered into. Pet. A26-A27.

The judicial review proceedings.—On May 12, 1967, the petitioners filed a complaint with the District Court to impeach the award. The complaint alleged in general terms the grounds specified in Section 9 *Third* (a) and (b) of the Act for impeaching arbitration awards, primarily focusing on the absence of specific recitals in the arbitration agreement as to the various procedural matters listed in Section 8 of the Act. The District Court granted a motion for summary judgment filed by the petitioners, on the grounds that the fact that the arbitration board consisted of five members violated the terms of the agreement to arbitrate. (Pet. A6)

On appeal, the Court of Appeals for the Sixth Circuit unanimously reversed the judgment of the District Court. It held that the brotherhoods had waived any point which they had concerning the fact that the board consisted of five members, rather than the three or the six contemplated by the Act, inasmuch as the brotherhoods had never objected to this point before the arbitration board.

(Pet. A12-A13). The court also considered the contention, now emphasized by the Petition for Certiorari, that the agreement to arbitrate contained in the National Agreements did not contain all the recitals listed in Section 8 of the Act. Here again, the court observed that this point had not been raised before the arbitrators and that the only procedural or jurisdictional objection made by the brotherhoods before the arbitrators was that the carrier had no right to institute the procedure to pool the cabooses and that this question was not arbitrable. The Court of Appeals pointed out that this latter issue had been passed on and properly decided by the arbitrators. (Pet. A13)

ARGUMENT

1. The petitioners' basic position here is that the "entire arbitration proceeding" at issue "comes perilously close to compulsory arbitration" (Pet. 18) and that "in a very real sense the Court of Appeals has substituted involuntary arbitration for voluntary arbitration." (Pet. 18) These assertions are sheer hyperbole; petitioners were party to agreements, the National Pooling of Cabooses Agreements, which expressly provided the procedures to be followed "whenever the carrier desires so to pool its cabooses"; those Agreements provided that in the event of a dispute which could not be settled by the parties by their own efforts, or after the efforts of the National Mediation Board, "the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. The decision of the arbitration board shall be final and binding upon both parties." (Pet. 11)

The arbitration procedure here was not a compulsory arbitration to which the brotherhoods had not agreed, but the very procedure that the brotherhoods and the carriers

had agreed upon as the means of settling disputes as to the pooling of cabooses. Indeed, it was at the insistence of the brotherhoods that Clinchfield in the first instance submitted the question of its pooling of cabooses to the procedures contemplated by the National Pooling of Cabooses Agreements to which it and the petitioners were parties. In the light of this background, the broad assertion of petitioners that they were forced into a compulsory arbitration not provided for by the Act is absurd.[1]

2. The position of the petitioners, more narrowly stated, is that they could not be required to proceed to arbitrate pursuant to the arbitration clauses of the National Pooling of Cabooses Agreements which they had signed until such time as they chose to sign a further document containing recitals as to the various procedures contemplated by Sec-

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[1] Although this case hardly involves compulsory arbitration, perhaps a word is appropriate with respect to petitioners' apparent suggestion that compulsory arbitration is not contemplated by the Railway Labor Act. Nothing could be further from the truth. The Act, of course, contains a compulsory arbitration procedure, administered by the National Railroad Adjustment Board, for the compulsory arbitration of grievances or so-called "minor disputes." See § 3, 45 U.S.C. § 153; *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723-28 (1945). Indeed, this Court has in terms characterized the § 3 procedure as "compulsory arbitration." *Brotherhood of Railroad Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30, 39 (1957).

One of the petitioners took the position that if the dispute was not arbitrable under the Agreement, the only recourse of Clinchfield was to follow the procedures of the Railway Labor Act for the making of changes in collective bargaining agreements, the so-called "major disputes" provisions, which do not provide for compulsory arbitration. See Arb. Tr. 37; Pet. A15; and § 6 of the Act; see also *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U.S. 284 (1963). The Petition for Certiorari renews this suggestion. Pet. 18-19. But, clearly, if there had been no agreement to arbitrate here, the Adjustment Board procedures contemplated by § 3 would have been applicable; the case is clearly one of the construction or interpretation of the National Pooling of Cabooses Agreements, not an effort on the part of Clinchfield to change those Agreements.

tion 8 of the Act. (Pet. 19) Why it should be incumbent that the parties execute a second agreement to arbitrate when they had already executed one is not suggested by petitioners. The only predictable consequence of such a procedure would be delay, perhaps without end. Petitioners carefully refrain from stating what the consequences would be if they refuse to join with Clinchfield in executing the second arbitration agreement after the mediation procedures had been exhausted. Doubtless that position would be that until and unless petitioners executed a new arbitration agreement, the arbitration could not go forward and Clinchfield would have no right to pool cabooses.[2] Such a construction of the arbitration provisions of the Railway Labor Act is hardly consistent with the general purpose of the Act, specified in Section 2, "to provide for the prompt and orderly settlement of all disputes."

Petitioners' position is that the agreement to arbitrate had to contain recitals on all the procedural matters specified in subsections (b) through (n) of Section 8 of the Act, and that any failure to include any of these recitals vitiated the award later rendered. To give one example, it is apparently petitioners' position that the agreement is fatally deficient because it did not provide, in the terms specified

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[2] Indeed, at one point before the arbitrator, the brotherhood representatives asserted that before the arbitrators could proceed the brotherhoods had to join with the carrier representatives in executing a document framing the question to be decided by the arbitrators, and that if the parties were unable to agree on the form or substance of such a document, the arbitration could not proceed. Arb. Tr. 19, 59-60, 98. One is reminded of the situation referred to in the Court's opinion in *Elgin, J. & E. R. Co.* v. *Burley, supra,* 325 U.S., at 725-26, where prior to the 1934 amendments to the Railway Labor Act the parties were able to "defeat the intended settlement of grievances by declining to join in creating the local boards of adjustment provided for by that [the 1926] Act."

in Section 8(g) of the Act, that "the signatures of a majority of said board of arbitration affixed to the award shall be competent to constitute a valid and binding award." But the parties expressly agreed that the arbitration would take place "under the Railway Labor Act, as amended." Surely this can be construed in no other way than as a reference to the procedures recited in Section 8 of the Act. Indeed, the specific procedure just quoted was in fact followed, as were all the relevant procedural provisions of Section 8, except to the extent that the failure to follow them was attributable to petitioners. See Appendix A hereto.

The Act specifies as a ground for impeachment of an award that "The award plainly does not conform to the substantive requirements laid down by the Act for such awards, or that the proceedings were not substantially in conformity with this Act." Section 9 *Third* (a). The Act does not specify as a ground for impeachment of the award that the arbitration agreement fails to contain all the recitals mentioned in the Act.[3] The reason is obvious. In enacting Section 8, Congress was not concerned with the terms that the parties specified in the arbitration agreement, other than as a means to an end. That end is the rendition of an award in substantial conformity with the procedural requirements set forth in the Act. If there is substantial conformity with the procedural requirements

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[3] Clearly, at the time of the execution of the National Pooling of Cabooses Agreements, the details specified in § 8 could not be contemplated and provided for in the case of each possible dispute. The petitioners' position that § 8 had to be literally complied with in the arbitration agreement is, accordingly, as unreasonable factually as it is legally. The courts have in the past enforced general arbitration agreements which might cover a variety of disputes under the Railway Labor Act. See *Brotherhood of Railroad Trainmen* v. *St. Louis Southwestern R. Co.*, 220 F. Supp. 319 (E.D. Tex. 1963).

set forth in the Act, the failure of the arbitration agreement to recite them is hardly material.

The fact of the matter is that the procedural requirements of Section 8 of the Act, to the extent they touched on the arbitration at bar, were complied with, except in cases (such as the matter of the number of arbitrators, discussed at pp. 15-16, below) where the failure to comply with them is attributable to petitioners. We shall not burden the Court at this point with a detailed discussion of the substantial compliance of the actual proceedings before the arbitrators with the terms of the Act, but in Appendix A, pp. 1a-5a, *infra*, we detail the various procedural requirements of Section 8 and indicate how they were substantially complied with to the extent they were pertinent, except in those cases where the deviations are attributable to petitioners.[4]

The basic position of the petitioners here—that the arbitration agreement must specifically recite each of the various matters set forth in Section 8 of the Act as a condition upon the validity of the award—exalts form over substance in a fashion that is rarely suggested in a judicial, let alone an arbitral, proceeding.[5] In response to this posi-

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[4] Should it be held that an agreement to arbitrate under the Railway Labor Act must literally contain all the recitals enumerated in § 8 of the Act, there is an alternative ground for upholding the award here, which alternative ground we urged in the courts below—namely, that the agreement to arbitrate, and the award rendered thereunder, are valid at common law, apart from the Railway Labor Act. There is no reason to believe that the Railway Labor Act is intended to make arbitration more difficult than it would be at common law.

[5] For the flexibility and informality of arbitration, see *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 556-58 (1964); *American Almond Products Co.* v. *Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944); *Lodge No. 12*

tion, it is appropriate to quote the proviso to Section 8 *Third* of the Act: "An award contested as herein provided shall be construed liberally by the Court, with a view to favoring its validity, and . . . no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance."

3. The only specific contentions as to the procedural requirements of Section 8 of the Act which petitioners have dwelled upon in this case relate (i) to the provisions of subsection 8(e) of the Act respecting the definition of the questions to be determined by the arbitrators, which is stressed in this Court (Pet. 19-21), and (ii) to the provisions of subsection 8(c) of the Act as to the number of arbitrators, which was emphasized in the courts below. (Pet. A6, A12-A13) Neither of these contentions warrants further review.

(i) As to the definition of the questions to be determined by the arbitrators, the Agreements provided in broad terms for the procedure to be followed "whenever the carrier desires so to pool its cabooses"; the end of the line of this procedure is that "If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended." The points of dispute between the parties here were (1) whether the carrier had the right to pool cabooses, and (2) if so, what accommodations would be "substantially equivalent to those formerly available on the cabooses" and what arrangements would be appropriate "for supplying and servicing such pooled cabooses." There is no question but

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v. *Cameron Iron Works, Inc.*, 292 F.2d 112, 118-19 (5th Cir. 1961), *cert. denied*, 368 U.S. 926 (1961); *Griffith Co.* v. *San Diego College*, 45 Cal. 2d 501, 289 P.2d 476 (1955).

that these were the matters in dispute between the parties (see Arb. Tr. 71-72, 133),[6] and it was with these issues that the arbitrators proceeded to deal, in an orderly fashion, one after the other. The petitioners suggested that the first question was not arbitrable. The arbitration board decided that the first question was in fact arbitrable, and under the Agreements this decision, even if subject to judicial review, is clearly correct. *Cf. United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).[7]

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[6] Even though issue number (1) was belatedly raised by the brotherhoods (see p. 5, *supra*) and appears frivolous on its face. For this reason, the carrier representatives on the board at one point suggested that the issue was too clear for the arbitrators to deal with. See Arb. Tr. 174.

[7] It was the contention of the brotherhood representatives that the question as to the right of the carrier to pool cabooses was not determinable at all by the arbitrators but by a body known as the Disputes Committee under the National Agreements. See Appendix B, pp. 8a-9a, *infra;* Pet. A15-A16, A18; Arb. Tr. 165-66. The Disputes Committee under the 1951 and 1952 National Agreements had apparently not met for years at the time of the arbitration hearing. Arb. Tr. 54. The petitioners do not print in their petition the article of the Agreements, Article 14, which is alleged to govern. To demonstrate the complete irrelevance of the Disputes Committee procedure, we do so and reproduce the article in question as Appendix C, p. 10a, *infra.*

At this point, it is worth remembering (see n. 2, p. 3, *supra*) that the National Agreements do not deal exclusively with the subject of pooling of cabooses but deal with a variety of matters, in the treatment of certain of which no specific arbitration procedure is provided. Indeed, the bulk of the Agreements are devoted to the subjects of "Wage Increases" (Article 1), "Cost-of-Living Adjustment" (Article 2), and "Five-Day Work Week" (Article 3). These provisions, particularly the last-named, are enormously detailed, but no arbitration provision relates to them. Additional matters dealt with in the National Agreements are such subjects as "Initial Terminal Delay" (Articles 4 and 5), "Coupling and Uncoupling Air, Signal and Steam Hose" (Article 8), and "Reporting for Duty" (Article 11).

Presumably in connection with these other matters, disputes might have been contemplated to arise "in connection with the revision of individual agreements so as to make them conform to this agreement" (see Appendix C, p. 10a, *infra*); it must be remembered that the National Agreements were negotiated on an

(ii) The argument was stressed by petitioners in the courts below that there was impropriety in the constitution of the board, in that it consisted of five persons whereas the Act specifies that the board will consist of three, or, if the parties so stipulate, of six persons. Section 7 *First*. But petitioners can hardly complain of the composition of the board. It is plain from a reading of Section 7 *First* together with Section 7 *Second* that the basic difference between a board of three and a board of six is that a board of six members has two neutrals and the standard board of three only one. The nonneutral members are evenly divided between the parties in either case. Here, since the parties had not agreed on a board of six, the carrier instituted procedures for a board of three by naming a single carrier representative. Each of the two brotherhoods insisted on naming its own representative. Since the partisan representatives have one vote each,[8] the carrier countered by naming a second representative, to preserve the neutral's status under the Act as a tie-breaker. However, the parties had never agreed that there be named two neutral arbitrators, as would have been appropriate had the parties originally stipulated to a board of six arbitrators, and, accordingly, the Mediation Board named a single neutral arbitrator. The brotherhoods never registered any complaint that a second neutral arbitrator should have been named until after the award was made and the

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industry-wide basis, and dealt with wages, hours and a number of other subjects as to which there were local practices and agreements on the individual carriers. It is this problem with which the procedure set forth in Article 14 is concerned.

[8] The Act expressly contemplates that the arbitrators named by the parties will be partisan. See § 7 *Second* (d). See generally Gold and Furth, Note, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 Harv. L. Rev. 293, 296-302, 323-25 (1954).

case was in court. Under these circumstances, the authorities teach that any irregularity is waived. *Firemen's Fund Ins. Co.* v. *Flint Hosiery Mills, Inc.*, 74 F.2d 533, 535 (4th Cir. 1935), *cert. denied*, 295 U.S. 748 (1935); *Chicago, R.I. & P.R. Co.* v. *Union P.R. Co.*, 254 Fed. 235, 238 (8th Cir. 1918); *Judson* v. *United States*, 120 Fed. 637, 644 (2d Cir. 1903); *Merritt-Chapman & Scott Corp.* v. *Pennsylvania Turnpike Comm'n*, 261 F. Supp. 1 (M.D. Pa. 1966), *aff'd*, 387 F.2d 768 (3d Cir. 1967); *Petrol Corp.* v. *Groupement d'Achat des Carburants*, 84 F. Supp. 446, 448 (S.D. N.Y. 1949). See *American Almond Products Co.* v. *Consolidated Pecan Sales Co., supra*, 144 F.2d, at 450-451.

4. Finally, the Court of Appeals properly held that the brotherhoods had waived their objections to the form of the agreement to arbitrate,[9] as well as to the number of arbitrators. The only objection made by the brotherhoods before the arbitration board from a procedural standpoint was that the question as to the right of the carrier to pool cabooses was not arbitrable, and that, accordingly, the board could not proceed, at least in the absence of an agreement between the parties as to the questions to be arbitrated. It was perfectly obvious to everybody who could count to ten that the arbitrators were five in number—not three or six, as contemplated by the Act—and it was equally clear that the agreement to arbitrate contained a general reference to the provisions of the Railway Labor Act and did not *in ipsis verbis* contain certain of the various recitals enumerated in Section 8 of the Act. Yet the brotherhoods raised neither of these points before the

[9] As to most of the matters of the form of the agreement to arbitrate, the waiver point is simply alternative to the fact that the proceedings before the board substantially complied with Section 8 of the Act. See point 2 above, pp. 9-13, and Appendix A, pp. 1a-5a, below.

arbitration tribunal. These are precisely the sort of procedural matters which the courts have customarily held a party may waive by failure to object when he has full knowledge of them and proceeds with the arbitration. See *Chicago, R.I. & P.R. Co.* v. *Union P.R. Co., supra,* 254 Fed., at 238; *Livingston* v. *Shreveport-Texas League Baseball Corp.,* 128 F. Supp. 191, 203 (W.D. La. 1955), *aff'd per curiam,* 228 F.2d 623 (5th Cir. 1956); *San Carlo Opera Co.* v. *Conley,* 72 F. Supp. 825, 833 (S.D.N.Y. 1946), *aff'd,* 163 F.2d 310 (2d Cir. 1947); *Ilios Shipping & Trading Corp.* v. *American Anthracite & Bituminous Coal Corp.,* 148 F. Supp. 698, 700 (S.D.N.Y. 1957).

The decision of the Court of Appeals, accordingly, is clearly correct, there is no asserted conflict of circuits, and the questions tendered to this Court do not raise serious recurring issues of substance under the Railway Labor Act but essentially formal matters.

CONCLUSION

For the reasons stated, certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Analysis of the Procedural Requirements of Section 8 of the Railway Labor Act and Their Substantial Satisfaction Here or the Lack of any Prejudice from any Variance from Them.

Section 8 of the Act, in subsections (a) through (n), by providing for various recitals which the agreement to arbitrate is to contain, provides various procedural requirements. These will be discussed one by one. The section provides that the agreement to arbitrate—

"(a) shall be in writing;"

—Here the agreement in fact was in writing. See Section 7(c)(3) of the National Agreements.

"(b) shall stipulate that the arbitration is had under the provisions of this Act;"

—The Agreements expressly so stipulated.

"(c) shall state whether the Board of Arbitration is to consist of three or of six members;"

—Section 7 *First* of the Act provides that if the parties do not stipulate for a board of six, there shall be a board of three, thereby indeed contemplating that the parties might in fact not stipulate for one number or the other in their agreement. Here there was no stipulation as to numbers; the carrier initiated procedures for the constitution of the standard board of three; due to the insistence of the two separate brotherhoods on one representative each, the carrier named an additional representative; and the brotherhoods did not object when the Mediation Board proceeded only to name a single neutral arbitrator as

would have been contemplated by the original procedure for a board of three. See pp. 15-16 of the Brief, above.

> "(d) shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;"

—Here the Agreements were duly signed by the duly accredited representatives. They apparently were filed with the Mediation Board. While apparently not notarized, notarization is a formality tending to prove authenticity in the case of any dispute, and no suggestion of lack of authenticity of the National Agreements has been made here by the petitioners; indeed, they insisted that the carrier follow the requirements of those Agreements.

> "(e) shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;"

—Here the Agreements specified that disputes arising as a result of the conferences ensuing "whenever the carrier desires so to pool its cabooses" which are not resolved through conference or mediation shall be arbitrated. As developed in the Brief, the only questions passed on by the arbitrators were those as to which disputes had arisen in the course of the conferences. See Brief, pp. 13-14, above.

"(f) shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;"

—Here the parties never jointly sought to withdraw any question from arbitration.

"(g) shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;"

—Here the award was signed by a majority of the arbitrators.

"(h) shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;"

—Here the brotherhoods do not complain of any delay. Nor could they, inasmuch as any delay in the proceedings of the board simply postponed the date on which the carrier might pool its cabooses.

"(i) shall fix a period from the beginning of the hearings within which the said board shall make and file its award; Provided, that the parties may agree at any time upon an extension of this period;"

—See the comment on item (h) above.

"(j) shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;"

—The National Agreements clearly contemplate that the award shall become effective forthwith upon the carrier's pooling of its cabooses, and shall continue in effect indefinitely. The award rendered herein requires the carrier to make the substitute facilities available forthwith upon pooling the cabooses. The brotherhoods raise no objection to this timing of the effective date of the award.

"(k) shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award in proceedings shall constitute the full and complete record of the arbitration;"

—The award and proceedings were so certified and filed with the clerk's office of the District Court for the Eastern District of Tennessee, North Eastern Division. See Pet. A26-A27.

"(1) shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;"

—The Agreements provide that the decision "shall be final and binding upon both parties." This effect is given the award by Section 9 *Second* of the Act and it is only the brotherhoods which seek to controvert the award.

"(m) shall provide that any difference arising as to the meaning, or the application of the provisions, of

an award made by the Board of Arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award;"

—This effect is likewise given to the award by Section 9 *Third*. No occasion for an interpretation of the meaning of the award has arisen.

"(n) shall provide that the respective parties to the award will each faithfully execute the same."

—The Agreements provide that the decision "shall be final and binding upon both parties." There is no question but that an award rendered under the Railway Labor Act, as this one was agreed to be, would have this effect. It is only the brotherhoods which claim that the award is not binding.

APPENDIX B

Statement of the Brotherhood Representatives Presented to the Arbitration Board at the January, 1967, Session.

The Labor Party Members of Arbitration Board No. 292, Case A-7432, have previously advised the National Mediation Board and this Board that we are not agreeable to proceed with arbitration in the instant dispute because Article 7 of the ORC&B National Agreement of May 23, 1952 and Article 7 of the BRT National Agreement of May 25, 1951 are not applicable to the instant dispute, and as such, Arbitration Board No. 292 does not have jurisdiction in the dispute.

At the insistence of the Carrier and upon your conclusion that we must proceed to a consideration of this matter on its merits, we have convened as suggested by you. It must be understood that we do not waive any right, legal or otherwise. We object to and protest any effort on the part of this Board to arbitrate a dispute over which it does not have jurisdiction.

Article 7 of the ORC&B National Agreement of May 23, 1952 and Article 7 of the BRT National Agreement of May 25, 1951 are in effect on the Clinchfield Railroad. When the Agreements were negotiated, the Carrier had the election of preserving existing rules or practices or to adopt Article 7. By inaction, Article 7 became effective on the Clinchfield Railroad.

On or about April 2, 1965, Carrier addressed a letter to the General Chairmen of the ORC&B and BRT requesting conference to discuss a matter of mutual interest to the Carrier and the Organizations. Conference was held

on April 6, 1965 at which time Carrier advised the General Chairmen of its intention to pool cabooses in all classes of service on the railroad. The Chairmen opposed such pooling of cabooses on the basis that such pooling would not improve the service and expedite trains. Notwithstanding this, carrier issued a bulletin on the date of April 7, 1965, pooling cabooses effective April 16, 1965. Conference was held on April 12, 1965 and on request of the Chairmen, the Carrier postponed pooling of the cabooses for thirty days. During conference on May 15, 1965, Carrier was advised that the employees would take such action as was available to them to prevent pooling of cabooses.

Under date of May 17, 1965, Carrier served notice that it intended and desired to pool cabooses in all classes of service on all lines of the railroad. Subsequently, conference was held on May 28, 1965, without reaching agreement and on the same date just eleven days after the serving of the notice, carrier requested the services of the National Mediation Board. While the Board did assume jurisdiction, it suggested that further conferences should be held and such conferences were held on July 12, and 23rd, 1965 without reaching agreement. Mediation proceedings were started on September 7, 1965 and as suggested by the Mediator, a joint conference with the carrier was held at 10:00 a.m. on September 8, 1965, and at 3:00 p.m. The Case was recessed for Board consideration after approximately two hours and 15 minutes in actual mediation.

Article 7, Para. A, reads as follows:

"The employees affected by this rule and the carriers represented by the Eastern, Western and Southeastern Carriers Conference Committees, *being desirous of*

cooperating in situations where train service can be improved and trains expedited by the pooling of cabooses, adopt the following:" (underscoring supplied)

Throughout conferences, negotiation, mediation and before this Board, the employees have contended that Article 7 of the respective Agreements is applicable *only in situations where the service can be improved and trains expedited by the pooling of cabooses.* At no time has the Carrier contended or offered evidence to show this is such a situation. On the contrary, Erwin, Tennessee is located between Elkhorn, Kentucky and Spartanburg, South Carolina, 135 miles south of Elkhorn and 141 miles north of Spartanburg. No yard service is maintained at either Elkhorn or Spartanburg. All trains from either direction arriving Erwin are yarded with a complete breakup and classification necessary. Yard service is maintained and performed by yardmen at Erwin, Tennessee.

The employees vigorously contend that the provisions of Article 7 of the respective agreements are not applicable to the instant dispute because *it is not a situation where train service can be improved and trains expedited by the pooling of cabooses.*

Article 14 of the Agreement of May 23, 1952 and May 25, 1951 established a Disputes Committee which has jurisdiction over disputes involving the application of the terms of those agreements including Article 7. The parties are in dispute as to the application of Article 7 of the respective Agreements and such dispute has been submitted by the Organization to the Disputes Committees established under the respective agreements.

Therefore, it is the position of the Organizations that this Board does not have jurisdiction in the instant dis-

pute. The Labor Party Members request that the Board be recessed until a decision is rendered by the Disputes Committees and the parties have entered into an agreement to arbitrate, defining the questions to be decided, effective date and duration of the Award, etc., as required by the Railway Labor Act.

APPENDIX C

Article 14 of the National Agreements.

Any dispute arising between parties to this agreement in connection with the revision of individual agreements so as to make them conform to this agreement shall be referred jointly, or by either party, for decision to a committee, the carrier members of which shall be three members of the Carriers' Conference Committees, signatories hereto, or their successors, and the employee members of which shall be three representatives selected by the organization signatory hereto.

In the event the Committee is unable to reach a decision with respect to any such disputes, a neutral referee shall be selected by the members of the Committee, to sit with the Committee and act as a member thereof.

If a majority of the Committee is unable to agree upon the selection of a neutral referee, any three members of the Committee may request the National Mediation Board to appoint such neutral referee.

Decisions of a majority of all the members of the Committee shall be final and binding upon the parties to any dispute in which a decision may be rendered.